



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 8, 1996

Mr. Wayne Paul Frank
Assistant City Attorney
City of Denton
Municipal Building
Denton, Texas 76201

OR96-0485

Dear Mr. Frank:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 39249.

The City of Denton (the "city") received an open records request for responses to a certain "Demand Response Survey" conducted by the Services Program for Aging Needs ("SPAN"), a transit system that operates within the city. You contend that the requested responses are excepted from required public disclosure by section 552.103 of the Government Code. You also contend that the citizen responses to the survey are protected by common-law privacy because the respondents were promised that their responses would remain "completely confidential" and because the responses reflect the respondents' annual household income range.

We note at the outset that information is not confidential under the Open Records Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977). In other words, a governmental body cannot, through a contract or agreement, overrule or repeal provisions of the Open Records Act. Attorney General Opinion JM-672 (1987). Consequently, unless the requested information falls within one of the act's exceptions to disclosure, it must be released, notwithstanding any representations made by SPAN specifying otherwise.

We now address the exceptions to required public disclosure that you have raised. You contend that section 552.103(a) excepts this material from required disclosure because the requestor alleged during a city council meeting that SPAN and the city have

discriminated against her in providing transportation services and then "held up some papers which appeared to be legal pleadings and stated that the City and SPAN had not 'treated her right' and that she was going to file the papers in Federal Court in Sherman, Texas." You state, however, that to date the city has not been served with a lawsuit by the requestor and that the city currently has no knowledge of such a lawsuit being filed.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991) at 1. The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) at 4 and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

It is well established that where a requestor has publicly stated on more than one occasion an intent to sue, these threats alone do not trigger section 552.103. Open Records Decision No. 331 (1982). *See also* Open Records Decision No. 351 (1982). Based on the limited facts before this office, we cannot conclude that you have met your burden in establishing the likelihood of litigation in this particular instance. Accordingly, the city may not withhold the survey responses pursuant to section 552.103.

You also contend that common-law privacy, as incorporated into section 552.101 of the Government Code, protects the portions of any survey response that reveal the respondents' identities because the respondents were asked to supply information about their annual household income range. Section 552.101 protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information coming within the common-law right to privacy. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

In Open Records Decision No. 373 (1983), this office addressed the availability of personal financial information submitted to a city by an applicant for a housing rehabilitation grant. In that decision, this office concluded:

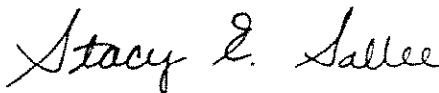
all financial information relating to an individual -- including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history -- ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

Open Records Decision No. 373 (1983) at 3. Whether the public has a legitimate interest in such information, however, must be determined on a case-by-case basis. *Id.* at 4; *see also* Open Records Decision Nos. 600 (1992), 545 (1990).

We agree that in this instance information revealing an identifiable respondent's annual household income could be highly intimate or embarrassing. Moreover, the information you have provided does not indicate any special circumstances that would make the information a matter of legitimate public concern. Accordingly, the city must withhold pursuant to section 552.101 all portions of the survey responses that would tend to reveal the identity of the respondents. The remaining information contained in the responses must be released to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/RWP/ch

Ref.: ID# 39249

Enclosures: Submitted documents

cc: Ms. Dessie Goodson
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(w/o enclosures)